

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Trademark Application Serial No. 76/212,011
Published in the Official Gazette of May 28, 2002, at page TM 1497, Int'l Class 35.
Filed: February 20, 2001
Mark: STAACHI'S CO. 1996 & DESIGN

SINCLAIR OIL CORPORATION

Opposer,

v.

SUMATRA KENDRICK

Applicant.

Opposition No. 152,940

**OPPOSER'S MOTION TO COMPEL
PRODUCTION OF DOCUMENTS
AND MEMORANDUM IN SUPPORT
THEREOF**

MOTION

Opposer Sinclair Oil Corporation ("SINCLAIR" or "Opposer"), by and through its counsel of record, hereby moves the Trademark Trial and Appeal Board ("TTAB") for an order compelling Applicant Sumatra Kendrick ("Applicant") to:

1. Withdraw its objections and/or refusal to produce documents in response to Opposer's Document Request Nos. 3-15, 18-19, 22-42, and produce documents and tangible things responsive thereto;

2. Provide a privilege log with identifying information for withheld documents, in detail sufficient to permit Opposer to test Applicant's invocation of privilege with respect thereto, including but not limited to the identities of the author/preparer, recipient, and others privy to the document or any communication reflected therein; and the date, form (written, recorded, etc.), and subject matter of the document;
3. Produce all documents it has agreed to produce, and all unprivileged documents responsive to the requests identified above, by making and shipping copies thereof to Opposer, who will reimburse Applicant for the cost thereof; and
4. Produce samples responsive to Opposer's Document Request Nos. 4, 7, 18, 24, 27 and 38 by shipping them to Opposer, who will reimburse Applicant for the cost thereof.

Opposer's undersigned attorneys have made a good faith efforts to resolve the issues presented herein by correspondence with Applicant, but Applicant has been wholly unresponsive to those efforts.

Other grounds for this Motion are set forth in the accompanying Memorandum.

DATED this 10th day of September, 2003.



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SINCLAIR OIL CORPORATION

MEMORANDUM

I. INTRODUCTION

Opposer Sinclair Oil Corporation ("SINCLAIR" or "Opposer") owns the following marks: United States Registration No. 929,749 ("the '749 Registration") for the mark "SUN DESIGN" in International Classes 35 and 41 for goods described, *inter alia*, as "retail apparel and gift store services;" United States Registration No. 929,750 ("the '750 Registration") for the mark "SUN VALLEY & SUN DESIGN" in International Classes 36, 41 and 42, for goods described, *inter alia*, as "retail apparel and gift store services;" United States Trademark Application Serial No. 78/157,978 for the mark "SUN VALLEY & RISING SUN DESIGN" in International Classes 35, 36, 39, 41 and 43, for goods described, *inter alia*, as "gift store services; retail store services"; and United States Trademark Application Serial No. 78/157,988 for the mark "SUN DESIGN" in International Classes 6, 9, 14, 16, 20, 21, 25, 26, 28, 35, 36, 39, 41, and 43, for goods described, *inter alia*, as "gift store services, retail store services" (collectively referred to herein as "Opposer's marks"). The '749 Registration and the '750 Registration owned by Opposer are incontestable marks.

Applicant Sumatra Kendrick ("Applicant") applied to register United States Trademark Application Serial No. 76/212,011 for the mark "STAACHI'S CO. 1996 & DESIGN" on February 20, 2001, for goods identified as "retail store services featuring bath products, gift products, candy products," in International Class 35 (referred to herein as "Applicant's mark" or the "mark at issue"). Applicant's mark was published for opposition on May 28, 2002. Recognizing the manifest likelihood of confusion, Opposer timely filed its Notice of Opposition on August 26, 2002.

After requesting and receiving an extension of time, Applicant answered the Opposition on January 28, 2003. Opposer served interrogatories and requests for document production on June 6, 2003. Applicant responded to Opposer's discovery requests on July 5, 2003. Declaration of Robyn L. Phillips in Support of Motion to Compel Production of Documents and

Things ("Phillips Decl."), Exh. A.¹ However, when Opposer responded, it did so with only two documents, precious little information, and a flood of objections made without explanation or justification.

In an effort to resolve the potential dispute over the responses to the written discovery, by letter of July 31, 2003, Opposer's counsel identified the multitude of deficiencies in Applicant's discovery responses, and requested that Applicant either supplement its deficient written discovery responses or explain the basis for its indiscriminately asserted defenses. Phillips Decl., Exh. B. Opposer provided Applicant with detailed explanations of Applicant's obligations related to responding to the written discovery propounded by Opposer and Applicant's deficiencies therein. *Id.* ¶ 4. In offering what actually would have constituted a full month extension of Applicant's deadline to respond to Opposer's discovery requests, Opposer requested that non-privileged, non-confidential documents be produced no later than August 6, 2003, and requested that the parties engaged in a meet and confer on August 4, 2003, to further discuss the issue. *Id.* ¶ 4, Exh. B. In addition, Opposer sent a letter on July 31, 2003, suggesting that the parties engage in a teleconference to discuss available options for an amicable resolution of the litigation, and proposed a date and time for such discussions. *Id.* ¶ 5, Exh. C.

On August 1, 2003, Opposer attempted to contact Applicant to engage in the suggested teleconference, but Applicant was not available at the proposed time, nor did Applicant return Opposer's message requesting that the parties confer to achieve resolution of the matter. *Id.* ¶ 6. On August 4, 2003, Opposer again contacted Applicant at the stated time for the "meet and confer" but the person who answered the telephone represented that Applicant was not home. *Id.* ¶ 7. Opposer called the telephone number it had for Applicant multiple times and has left multiple messages with the person who answers the telephone. *Id.* ¶ 8. As of this date, Applicant has not returned any message. *Id.* Applicant sent correspondence dated August 6, 2003, to Opposer in which Applicant acknowledged receipt of Opposer's July 31, 2003, letter

¹ All exhibits referenced herein are attached to the Declaration of Robyn L. Phillips in Support of Opposer's Motion to Compel Production of Documents and Things, filed contemporaneously herewith.

requesting that the parties discuss potential resolution of the matter. *Id.* ¶ 9 and Exh. D. Opposer also received the same correspondence by e-mail. *Id.*

Opposer has since learned that the address provided by Applicant to the TTAB as well as Opposer may be incorrect because, when Federal Express attempted to deliver the letters dated July 31, 2003 from Opposer to Applicant, Federal Express noted that the address was incorrect, and could not deliver the letters until August 6, 2003. *Id.* ¶ 10 and Exh. E. As a result, because Opposer has been unable to reach Applicant by any other reliable means and the apparent problem with the address provided by Applicant, on August 12, 2003, Opposer attempted to reach Applicant by replying to the e-mail address of Applicant's August 6, 2003, e-mail correspondence. *Id.* ¶ 11 and Exh. F. In its e-mail, Opposer, stated that Opposer could not accept Applicant's deficient discovery responses, that the discovery deadline is approaching, and that the parties needed to meet and confer regarding the discovery dispute. *Id.*, Exh. F. The e-mail also requested accurate contact information for Applicant. *Id.* Applicant never responded to this e-mail.

On August 13, 2003, Opposer filed a Motion to Compel Answers to Interrogatories and Production of Documents and Things ("Motion to Compel"). On August 29, 2003, after Opposer filed its Motion to Compel, Applicant submitted Sumatra Kendrick's Second Set of Supplemental Answers to Interrogatories,² attached as Exh. G to the Phillips Decl., which failed to address numerous deficiencies outlined in Opposer's first Motion to Compel. On August 28, 2003 the TTAB issued an Order ("the Order"), denying Opposer's Motion to Compel without prejudice on the basis that the Motion was in excess of the page limit.³

² Opposer notes that, contrary to Applicant's caption for its supplemental responses, Opposer has not received a first set of supplemental responses from Applicant.

³ In an effort to be concise in its filings and reduce the number of motions filed with the TTAB, Opposer combined its arguments related to Applicant's deficient responses to Opposer's interrogatories and document requests into a single Motion to Compel. As the Board noted in the Order, the Motion to Compel exceeded the maximum page limit set forth in Trademark Rule 2.127(a). Opposer apologizes for its oversight, and therefore, files the instant Motion to Compel Production of Documents and Things contemporaneously with and separately from its Motion to Compel Answers to Interrogatories for purposes of addressing Applicant's continuing deficient responses to Opposer's document requests.

As of this date, Applicant still fails to respond to Opposer's forty-two (42) requests for production, Opposer received only two documents in Applicant's first production of documents, and only four documents with Applicant's second production, one of which is a duplicate of a previously produced document. Further, although Applicant received notice that Opposer objected to the vague and evasive objections being made, Applicant has disregarded Opposer's deficiency letters, messages and attempts to achieve resolution of the Opposition matter. See Phillips Decl. ¶¶ 4-8.

Unfortunately, Applicant's failure to respond to Opposer's document requests places Opposer at a serious disadvantage. Opposer is unable to take effective deposition testimony of Applicant or any other third party without the requested documents. Accordingly, Opposer previously filed a Motion to Extend Discovery and Trial Periods and renews its motion.

By its present motion, Opposer seeks an order compelling Applicant to produce documents and information, as indicated below.

II. APPLICABLE LEGAL STANDARDS

"Generally, the purpose of discovery is to remove surprise from trial preparation so the parties can obtain evidence necessary to evaluate and resolve their dispute." *United States v. City of Torrance*, 164 F.R.D. 493, 495 (C.D. Cal. 1995), attached hereto as Exh. H to the Phillips Decl. Accordingly,

A request for discovery should be considered relevant if there is any possibility that the information sought may be relevant to the subject matter of this action. Discovery should ordinarily be allowed under the concept of relevancy unless it is clear that the information sought can have no possible bearing upon the subject matter of this action.

Jones v. Commander, Kansas Army Ammunitions Plant, 147 F.R.D. 248, 250 (D. Kan. 1993), reproduced as Exh. I to the Phillips Decl. "The party who resists discovery has the burden to show that discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its objections." *Cable & Computer Tech., Inc. v. Lockheed Saunders*, 175 F.R.D. 646, 650 (C.D. Cal. 1997), reproduced as Exh. J to the Phillips Decl. Objections stated in

“boilerplate terms ... are improper.” *Miller v. Pancucci*, 141 F.R.D. 292, 302 (C.D. Cal. 1992), reproduced as Exh. K to the Phillips Decl.

A party resisting discovery by interposing privilege, in particular, bears “[t]he burden of establishing the existence of privilege,” and “must make a clear showing that it applies.” *Ali v. Douglas Cable Communications, Ltd.*, 890 F. Supp. 993, 994 (D. Kan. 1995), reproduced as Exh. L to the Phillips Decl. “Formally claiming a privilege should involve specifying which information and documents are privileged and for what reasons, especially when the nature of the information or documents does not reveal an obviously privileged matter.” *Paulsen v. Case Corp.*, 168 F.R.D. 285 (C.D. Cal. 1996), reproduced as Exh. M to the Phillips Decl.; *see also* Fed. R. Civ. P. 26(b)(5), *made applicable by* 37 C.F.R. § 2.120(a), TBMP § 101.02 (“When a party withholds information ... by claiming that it is privileged ... the party ... shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged ... will enable other parties to assess the applicability of the privilege”).

Moreover, when privilege is invoked to justify a party’s refusal to produce a document or other communication, only the contents of the communication may be withheld; the existence of that communication, together with basic identifying information, remains discoverable and must be produced. Thus, no invocation of privilege can justify a party’s refusal to provide at least the following information about each withheld document: the identities of the author/preparer, recipient, and others privy to the document or any communication reflected therein; and the date, form (written, recorded, etc.), and subject matter of the document. *Miller*, 141 F.R.D. at 302; *Fox v. California Sierra Fin. Servs.*, 120 F.R.D. 520, 524 & n. 1 (N.D. Cal. 1988), reproduced as Exh. N to the Phillips Decl.

III. DOCUMENT REQUESTS

A. Document Request Nos. 3, 5 – 7, 14, 15, 18, 26, 35 and 42.

With respect to Opposer's forty-two (42) Requests for Production of Documents, Applicant asserts a number of objections, producing only six documents, two of which are identical. Most, if not all of the objections and responses to these requests are improper as follows:

DOCUMENT REQUEST NO. 3: Documents evidencing Applicant's use of the name or mark STAACHI'S CO. 1996 & DESIGN, and/or any portion thereof, either alone or in combination, in each state or geographic region where such mark and/or portion thereof has been used and the date of first use thereof, if any.

RESPONSE: Refer to Document #1
b. Northern California

2d RESPONSE: Applicant will produce non-privilege [sic], relevant information, if any, upon the entry of an appropriate Stipulated Protective Order in this matter.

Subject to the objections herein and without waiver of such, Applicant will provide documents, if any, related to this request.

DOCUMENT REQUEST NO. 5: All documents reflecting or referring or relating in any way to any authority or permission to use the name or mark STAACHI'S CO. 1996 & DESIGN and/or any portion thereof, either alone or in combination, granted by or to you.

RESPONSE: Refer to Document #2

2d RESPONSE: Applicant will produce non-privilege [sic], relevant information, if any, upon the entry of an appropriate Stipulated Protective Order in this matter.

Subject to the objections herein and without waiver of such, Applicant will provide documents, if any, related to this request.

DOCUMENT REQUEST NO. 6: All documents pertaining to or constituting Applicant's application for and/or registration of the mark STAACHI'S CO. 1996 & DESIGN, any portion thereof, either alone or in combination, and/or a name or mark similar thereto as a trademark, service mark, trade name and/or corporate name in the United States Patent and Trademark Office, or any state of the United States.

RESPONSE: Refer to Document #2

2d RESPONSE: Applicant will produce non-privilege [sic], relevant information, if any, upon the entry of an appropriate Stipulated Protective Order in this matter.

Subject to the objections herein and without waiver of such, Applicant will provide documents, if any, related to this request.

DOCUMENT REQUEST NO. 7: All documents pertaining to Applicant's planned and actual use of the mark STAACHI'S CO. 1996 & DESIGN, any portion thereof, either alone or in combination, and/or any name or mark similar thereto as a mark or trade name, including, without limitation, stationery, business cards, brochures, labels, catalogs, instruction sheets, package inserts, advertisements, and/or any other documents intended for distribution to or use by customers of Applicant and copies of each invoice, receipt, or other document evidencing sales or offers for sale, if any.

RESPONSE: Refer to Document #1

2d RESPONSE: Applicant will produce non-privilege [sic], relevant information, if any, upon the entry of an appropriate Stipulated Protective Order in this matter.

Subject to the objections herein and without waiver of such, Applicant will provide documents, if any, related to this request.

DOCUMENT REQUEST NO. 14: All documents concerning any agreement, license, contract, private label arrangement or other arrangement between Applicant and any third party that refers or relates to the mark or name STAACHI'S CO. 1996 & DESIGN and/or any portion thereof, either alone or in combination, and/or any associated goods or products.

RESPONSE:⁴ Refer to the examining Trademark examining Attorney; Refer to document number 2

2d RESPONSE: Applicant will produce non-privilege [sic], relevant information, if any, upon the entry of an appropriate Stipulated Protective Order in this matter.

Subject to the objections herein and without waiver of such, Applicant will provide documents, if any, related to this request.

DOCUMENT REQUEST NO. 15: Every document and thing referring or relating to each trademark search or other investigation or studies regarding the name or mark STAACHI'S CO. 1996 & DESIGN and/or any portion thereof, either alone or in combination.

RESPONSE: Refer to the examining Trademark examining Attorney

⁴ In its first set of responses, Applicant indicated Document Request No. 15 in two of its responses, hence Opposer presumes that the first of the two responses included a typographical error and Applicant intended that the first of the two responses, as produced to Opposer, refers to Document Request No. 14. This inaccuracy is not reflected in Applicant's second responses.

2d RESPONSE: Applicant will produce non-privilege [sic], relevant information, if any, upon the entry of an appropriate Stipulated Protective Order in this matter.

Subject to the objections herein and without waiver of such, Applicant will provide documents, if any, related to this request.

DOCUMENT REQUEST NO. 18: Representative samples of each of the goods with which Applicant has used or intends to use the name or mark STAACHI'S CO. 1996 & DESIGN and/or any portion thereof, either alone or in combination.

RESPONSE: Refer to Document number 1

2d RESPONSE: Applicant will produce non-privilege [sic], relevant information, if any, upon the entry of an appropriate Stipulated Protective Order in this matter.

DOCUMENT REQUEST NO. 26: All documents pertaining to or constituting Applicant's application for and/or registration of the DESIGN and/or a name or mark similar thereto as a trademark and/or service mark in the United States Patent and Trademark Office, or any state of the United States.

RESPONSE: Refer to document #2

2d RESPONSE: Applicant will produce non-privilege [sic], relevant information, if any, upon the entry of an appropriate Stipulated Protective Order in this matter.

Subject to the objections herein and without waiver of such, Applicant will provide documents, if any, related to this request.

DOCUMENT REQUEST NO. 35: Every document and thing referring or relating to each trademark search or other investigation or studies regarding the DESIGN.

RESPONSE:⁵ Refer to TARR Web Server for History

2d RESPONSE: Applicant will produce non-privilege [sic], relevant information, if any, upon the entry of an appropriate Stipulated Protective Order in this matter.

Subject to the objections herein and without waiver of such, Applicant will provide documents, if any, related to this request.

DOCUMENT REQUEST NO. 42: All documents referred to, relied on, considered, or relevant to your Answers to SINCLAIR's First Set of Interrogatories to Applicant.

⁵ In its first set of responses, Applicant indicated Document Request No. 36 in two of its responses, hence Opposer presumes that the first of the two responses included a typographical error and Applicant intended that the first of the two responses, as produced to Opposer, refers to Document Request No. 35. This inaccuracy is not reflected in Applicant's second responses.

RESPONSE: Refer to document number 41

2d RESPONSE: Applicant will produce non-privilege [sic], relevant information, if any, upon the entry of an appropriate Stipulated Protective Order in this matter.

Subject to the objections herein and without waiver of such, Applicant will provide documents, if any, related to this request.

The Federal Rules of Civil Procedure clearly specify that materials and things are the proper subject matter of requests for production of documents. Fed. R. Civ. P. 26(b). In response to the above request, Applicant has produced only six documents, two of which are identical. Applicant should be compelled to produce the requested documents immediately.

For example, Applicant's reference to an image of the mark at issue in response to Document Request No. 1, and Applicant's subsequent references to the same image of the mark at issue in its responses to Document Request Nos. 3, 7, and 18 does not satisfy Applicant's obligation to produce documents in response to the above-referenced requests for production.

Applicant's vague responses to the above document requests will not fulfill Applicant's stated intent to produce documents, nor will Applicant's production of a mere six documents. Applicant should be compelled to produce unprivileged documents immediately, and to identify in a privilege log any documents withheld on the basis of privilege, in detail sufficient to permit Opposer to test any invocation of privilege with respect thereto, without delay.

B. Document Request No. 4, 8, 10, 12, 13, 22 – 25, 29, 30, 32 – 34, 37, 38 and 41.

DOCUMENT REQUEST NO. 4: All documents pertaining to Applicant's selection and adoption of the mark STAACHI'S CO. 1996 & DESIGN as a whole, each portion of such mark if portions were selected and adopted separately, and/or any names or marks similar thereto, as a mark and/or trade name, including without limitation all proposals, resolutions, memorandums, correspondence, marketing research, trade name or mark search results, legal opinions, art work, and press releases.

RESPONSE: Non-Applicable

2d RESPONSE: Applicant will produce non-privilege [sic], relevant information, if any, upon the entry of an appropriate Stipulated Protective Order in this matter.

Subject to the objections herein and without waiver of such, Applicant will provide documents, if any, related to this request.

DOCUMENT REQUEST NO. 8: All documents pertaining to any consideration of, decisions about, or activities concerning the use, whether planned use or actual use, by Applicant of STAACHI'S CO. 1996 & DESIGN, and/or any portion thereof, either alone or in combination, and/or any name or mark similar thereto as a mark and/or trade name in connection with retail store services featuring, bath products, gift products, and candy products.

RESPONSE: Non-Applicable

2d RESPONSE: Applicant will produce non-privilege [sic], relevant information, if any, upon the entry of an appropriate Stipulated Protective Order in this matter.

Subject to the objections herein and without waiver of such, Applicant will provide documents, if any, related to this request.

DOCUMENT REQUEST NO. 10: All documents reflecting or referring or relating in any way to communications, agreements, or understandings between Applicant, its agents or employees, and any person, entity or corporation concerning the name or mark STAACHI'S CO. 1996 & DESIGN and/or any portion thereof, either alone or in combination.

RESPONSE: Non-Applicable

2d RESPONSE: Applicant will produce non-privilege [sic], relevant information, if any, upon the entry of an appropriate Stipulated Protective Order in this matter.

Subject to the objections herein and without waiver of such, Applicant will provide documents, if any, related to this request.

DOCUMENT REQUEST NO. 12 All documents which refer to or are unsolicited publicity of any kind concerning the name or mark STAACHI'S CO. 1996 & DESIGN and/or any portion thereof, either alone or in combination.

RESPONSE: Non-Applicable

2d RESPONSE: Applicant will produce non-privilege [sic], relevant information, if any, upon the entry of an appropriate Stipulated Protective Order in this matter.

Subject to the objections herein and without waiver of such, Applicant will provide documents, if any, related to this request.

DOCUMENT REQUEST NO. 13: All design, graphic and legal guidelines, directions, policies, and instructions, including trademark usage directions, concerning the name or mark STAACHI'S CO. 1996 & DESIGN and/or any portion thereof, either alone or in combination.

RESPONSE: Non-Applicable

2d RESPONSE: Applicant will produce non-privilege [sic], relevant information, if any, upon the entry of an appropriate Stipulated Protective Order in this matter.

DOCUMENT REQUEST NO. 22: Every document and thing referring or relating to Applicant's first use or planned use of the DESIGN in interstate commerce.

RESPONSE: Non-Applicable

2d RESPONSE: Applicant will produce non-privilege [sic], relevant information, if any, upon the entry of an appropriate Stipulated Protective Order in this matter.

Subject to the objections herein and without waiver of such, Applicant will provide documents, if any, related to this request.

DOCUMENT REQUEST NO. 23: Documents evidencing Applicant's use of the DESIGN in each state or geographic region where such mark has been used and the date of first use thereof, if any.

RESPONSE: Non-Applicable

2d RESPONSE: Applicant will produce non-privilege [sic], relevant information, if any, upon the entry of an appropriate Stipulated Protective Order in this matter.

Subject to the objections herein and without waiver of such, Applicant will provide documents, if any, related to this request.

DOCUMENT REQUEST NO. 24: All documents pertaining to Applicant's selection and adoption of the DESIGN and/or a mark similar thereto, as a mark, including without limitation all proposals, resolutions, memorandums, correspondence, marketing research, trade name or mark search results, legal opinions, art work, and press releases.

RESPONSE: Non-Applicable

2d RESPONSE: Applicant will produce non-privilege [sic], relevant information, if any, upon the entry of an appropriate Stipulated Protective Order in this matter.

Subject to the objections herein and without waiver of such, Applicant will provide documents, if any, related to this request.

DOCUMENT REQUEST NO. 25: All documents reflecting or referring or relating in any way to any authority or permission to use the DESIGN granted by or to you.

RESPONSE: Non-Applicable

2d RESPONSE: Applicant will produce non-privilege [sic], relevant information, if any, upon the entry of an appropriate Stipulated Protective Order in this matter.

Subject to the objections herein and without waiver of such, Applicant will provide documents, if any, related to this request.

DOCUMENT REQUEST NO. 29: All documents evidencing expenditures made by Applicant in identifying, creating, adapting, using and/or promoting the DESIGN or any mark similar thereto as a mark including, without limitation, all invoices, brochures, or ordering documentation containing the DESIGN or any mark similar thereto and all invoices related to advertising expenses involving the DESIGN or any mark similar thereto.

RESPONSE: Non-Applicable

2d RESPONSE: Applicant will produce non-privilege [sic], relevant information, if any, upon the entry of an appropriate Stipulated Protective Order in this matter.

Subject to the objections herein and without waiver of such, Applicant will provide documents, if any, related to this request.

DOCUMENT REQUEST NO. 30: All documents reflecting or referring or relating in any way to communications, agreements, or understandings between Applicant, its agents or employees, and any person, entity or corporation concerning the DESIGN.

RESPONSE: Non-Applicable

2d RESPONSE: Applicant will produce non-privilege [sic], relevant information, if any, upon the entry of an appropriate Stipulated Protective Order in this matter.

Subject to the objections herein and without waiver of such, Applicant will provide documents, if any, related to this request.

DOCUMENT REQUEST NO. 32: All documents which refer to or are unsolicited publicity of any kind concerning the DESIGN.

RESPONSE: Non-Applicable

2d RESPONSE: Applicant will produce non-privilege [sic], relevant information, if any, upon the entry of an appropriate Stipulated Protective Order in this matter.

Subject to the objections herein and without waiver of such, Applicant will provide documents, if any, related to this request.

DOCUMENT REQUEST NO. 33: All design, graphic and legal guidelines, directions, policies, and instructions, including trademark usage directions, concerning the DESIGN.

RESPONSE: Non-Applicable

2d RESPONSE:⁶

DOCUMENT REQUEST NO. 34: All documents concerning any agreement, license, contract, private label arrangement or other arrangement between Applicant and any third party that refers or relates to the DESIGN and any associated goods or products.

RESPONSE: Non-Applicable

2d RESPONSE: Applicant will produce non-privilege [sic], relevant information, if any, upon the entry of an appropriate Stipulated Protective Order in this matter.

Subject to the objections herein and without waiver of such, Applicant will provide documents, if any, related to this request.

DOCUMENT REQUEST NO. 37: Every document and thing reflecting or relating to each cease and desist letter or challenge or warning that Applicant has sent to or received from any person or organization relating to the DESIGN.

RESPONSE: Non-Applicable

2d RESPONSE: Applicant will produce non-privilege [sic], relevant information, if any, upon the entry of an appropriate Stipulated Protective Order in this matter.

Subject to the objections herein and without waiver of such, Applicant will provide documents, if any, related to this request.

DOCUMENT REQUEST NO. 38: Representative samples of each of the goods with which Applicant has used or intends to use the DESIGN.

RESPONSE: Non-Applicable

2d RESPONSE: Applicant will produce non-privilege [sic], relevant information, if any, upon the entry of an appropriate Stipulated Protective Order in this matter.

Subject to the objections herein and without waiver of such, Applicant will provide documents, if any, related to this request.

DOCUMENT REQUEST NO. 40: All documents related to or referring to any instances of actual confusion involving the DESIGN of which Applicant, its agents, or employees are aware.

⁶ Opposer notes that it did not receive page no. 59 to Sumatra Kendrick's Second Set of Supplemental Answers to Production of Documents and Things, which presumably sets forth Applicant's supplemental answer to Document Request No. 33. Opposer reserves the right to address and/or object to any future response Applicant may provide to Document Request No. 33.

RESPONSE: Non-Applicable

2d RESPONSE: Applicant will produce non-privilege [sic], relevant information, if any, upon the entry of an appropriate Stipulated Protective Order in this matter.

Subject to the objections herein and without waiver of such, Applicant will provide documents, if any, related to this request.

DOCUMENT REQUEST NO. 41: All documents and things not produced with respect to the above requests that Applicant will or may rely on in this opposition proceeding.

RESPONSE [1]: Non-Applicable

RESPONSE [2]: All documents were answered to the best of my ability and knowledge, in light of the fact my request for a 1 month extension was denied by attorney Robyn L. Phillips.

2d RESPONSE: Applicant will produce non-privilege [sic], relevant information, if any, upon the entry of an appropriate Stipulated Protective Order in this matter.

Subject to the objections herein and without waiver of such, Applicant will provide documents, if any, related to this request.

An objection of "Non-Applicable" is not recognized by the Federal Rules of Civil Procedure. As such, Applicant fails to state any proper objection in its first responses to the above-referenced discovery requests, and therefore waives any objection to its obligation to provide sufficient responses. Fed. R. Civ. P. 34(b). Assuming, *arguendo*, that Applicant intends by its single objection to raise an issue as to relevance, Opposer moves to compel production of documents and information on the basis that Applicant's objection as to relevancy is improper with regard to the above-referenced requests. Applicant's supplemental responses indicating that Applicant will produce documents, if any, fails to remedy Applicant's continuing failure to respond adequately to Opposer's requests for production. Applicant should be compelled to produce the requested documents immediately.

Discovery should ordinarily be allowed under the concept of relevancy unless it is clear that the information sought can have no possible bearing upon the subject matter of this action." *Jones v. Commander, Kansas Army Ammunitions Plant*, 147 F.R.D. 248, 250 (D. Kan. 1993). As every document upon which "Applicant will or may rely on in this opposition proceeding"

must have some "bearing upon the subject matter of this action," the documents sought by this request are clearly discoverable. Applicant is not entitled to hide its evidence until trial. Rather than being "Non-Applicable" the above requests seek documents that are clearly relevant and necessary to the task of evaluating Applicant's "intent to copy or imitate" Opposer's mark.

For example, with respect to Document Request Nos. 4, 8, 10, 13, 24, 29, 30 and 37, the relevance of these documents sought is clear because "[d]etermining whether a likelihood of confusion exists requires weighing ... the defendant's intent to copy or imitate the plaintiff's mark." *Al-Site Corp.*, 50 U.S.P.Q.2d at 1173. Opposer is entitled to the documents sought to determine how and whether any perceived similarity between the parties' marks influenced Applicant's selection of its mark. See *Goodyear Tire & Rubber Co.*, 186 U.S.P.Q. at 208. The documents sought by the above requests are relevant to both inquiries.

By way of further example, Document Request No. 40 requests "documents related to or referring to any instances of actual confusion involving the DESIGN of which Applicant, its agents, or employees are aware." This document request is reasonably calculated to lead to admissible evidence, including Applicant's claim to own "STAACHI'S CO. 1996 & DESIGN" and any claim Applicant may make about whether the name or mark at issue can identify Applicant, as opposed to Opposer, as the source of Applicant's goods.

Applicant's "Non-Applicable" objections cannot be sustained, and a mere six documents will not fulfill Applicant's stated intent to produce documents. Applicant should be compelled to produce non-confidential responsive documents immediately. Should Applicant withhold any documents on the basis of privilege, Applicant must identify any withheld documents in a privilege log and produce such confidential documents as appropriate upon entry of a suitable protective order.

C. Document Request Nos. 9, 11, 19, 27, 28, 31, 36 and 39.

DOCUMENT REQUEST NO. 9: All documents evidencing expenditures made by Applicant in identifying, creating, adapting, using and/or promoting STAACHI'S CO. 1996 & DESIGN, and/or any portion thereof, either alone or in combination, and/or any name or mark similar thereto as a mark or trade name, including, without limitation, all

invoices, brochures, or ordering documentation containing the term STAACHI'S CO. 1996 & DESIGN, and/or any portion thereof, either alone or in combination, and/or any term similar thereto and all invoices related to advertising expenses involving the name and/or mark STAACHI'S CO. 1996 & DESIGN, and/or any portion thereof, either alone or in combination, and/or any mark similar thereto.

RESPONSE: I object to this question it is a matter of Trademark Secrets

2d RESPONSE: Applicant will produce non-privilege [sic], relevant information, if any, upon the entry of an appropriate Stipulated Protective Order in this matter.

DOCUMENT REQUEST NO. 11: All documents reflecting or referring or relating in any way to Applicant's plans for future expansion, insofar as such expansion involves or pertains to the mark STAACHI'S CO. 1996 & DESIGN, and/or any portion thereof, either alone or in combination, and/or to Applicant's use thereof.

RESPONSE: I object to this question, It is a matter of Trademark Secrets

2d RESPONSE: Applicant will produce non-privilege [sic], relevant information, if any, upon the entry of an appropriate Stipulated Protective Order in this matter.

DOCUMENT REQUEST NO. 19: All documents referring and/or relating to Applicant's present and/or anticipated distribution system for goods or services offered in association with the name or mark STAACHI'S CO. 1996 & DESIGN and/or any portion thereof, either alone or in combination.

RESPONSE: I object to this question it is a matter of Trademark Secrets

2d RESPONSE: Applicant will produce non-privilege [sic], relevant information, if any, upon the entry of an appropriate Stipulated Protective Order in this matter.

Subject to the objections herein and without waiver of such, Applicant will provide documents, if any, related to this request.

DOCUMENT REQUEST NO. 27: All documents pertaining to Applicant's planned and actual use of the DESIGN or any mark similar thereto as a mark, including, without limitation, stationery, business cards, brochures, labels, catalogs, instruction sheets, package inserts, advertisements, and/or any other documents intended for distribution to or use by customers of Applicant and copies of each invoice, receipt, or other document evidencing sales or offers for sale, if any.

RESPONSE: I object to this question, it is a matter of Trademark secrets.

2d RESPONSE: Applicant will produce non-privilege [sic], relevant information, if any, upon the entry of an appropriate Stipulated Protective Order in this matter.

Subject to the objections herein and without waiver of such, Applicant will provide documents, if any, related to this request.

DOCUMENT REQUEST NO. 28: All documents pertaining to any consideration of, decisions about, or activities concerning the use, whether planned use or actual use, by Applicant of the DESIGN or any mark similar thereto as a mark in connection with retail store services featuring, bath products, gift products, and candy products.

RESPONSE: I object to this question, it is a matter of Trademark secrets.

2d RESPONSE: Applicant will produce non-privilege [sic], relevant information, if any, upon the entry of an appropriate Stipulated Protective Order in this matter.

Subject to the objections herein and without waiver of such, Applicant will provide documents, if any, related to this request.

DOCUMENT REQUEST NO. 31: All documents reflecting or referring or relating in any way to Applicant's plans for future expansion, insofar as such expansion involves or pertains to the DESIGN or to Applicant's use thereof.

RESPONSE: [no response]

2d RESPONSE: Applicant will produce non-privilege [sic], relevant information, if any, upon the entry of an appropriate Stipulated Protective Order in this matter.

DOCUMENT REQUEST NO. 36: Every document and thing referring or relating to each opinion or evaluation regarding whether the selection and/or use by Applicant of the DESIGN would be, was, or is in conflict with Opposer's use of its SUN DESIGN, SUN VALLEY & SUN DESIGN and/or SUN VALLEY & RISING SUN DESIGN marks or with any other person's use of any other name or mark.

RESPONSE: I object to this question, it is a matter of Trademark Secrets.

2d RESPONSE: Applicant will produce non-privilege [sic], relevant information, if any, upon the entry of an appropriate Stipulated Protective Order in this matter.

Subject to the objections herein and without waiver of such, Applicant will provide documents, if any, related to this request.

DOCUMENT REQUEST NO. 39: All documents referring and/or relating to Applicant's present and/or anticipated distribution system for goods or services offered in association with the DESIGN.

RESPONSE: I object to this question, it is a matter of Trademark Secrets.

2d RESPONSE: Applicant will produce non-privilege [sic], relevant information, if any, upon the entry of an appropriate Stipulated Protective Order in this matter.

Subject to the objections herein and without waiver of such, Applicant will provide documents, if any, related to this request.

It strains credibility to believe that all documents “referred to, relied on, considered or relevant to” Applicant’s discovery responses are “Trademark Secrets.” With regard to some subset of responsive documents, Applicant’s invocation of privilege might or might not have merit; however, the proper course is for Applicant to provide the identifying information necessary to permit Opposer to test Applicant’s invocation of privilege. Applicant should be compelled to produced unprivileged documents immediately, and to identify withheld documents in detail sufficient to permit Opposer to test Applicant’s invocation of privilege.

Applicant apparently attempts to invoke privilege in its responses to the above-referenced document requests, but with no attempt to make the requisite clear showing of their applicability. *See Ali*, 890 F. Supp. at 994. “Formally claiming a privilege should involve specifying which information and documents are privileged and for what reasons Defendant corporation has not done this. Thus, defendant’s objections are without merit.” *Paulsen*, 168 F.R.D. at 289 (rejecting unsupported invocation of attorney-client and work product privileges). Moreover Applicant cannot plausibly claim “Trademark Secret” protection for all “proposals, resolutions, memorandums, correspondence, marketing [opinions], ... art work, and press releases”; and “trade name or mark search results”; such information is not privileged, *see Miles Labs., Inc.*, 185 U.S.P.Q. at 434 (“search reports, per se, do not fall within the attorney-client privilege and must be furnished”; only “comments or opinions provided by [counsel] in relation thereto are privileged”).

For example, in the context of this opposition proceeding, the scope of “future expansion”, as set forth in Document Request No. 11 is quite clear: at issue is Applicant’s right to register its “STAACHI’S CO. 1996 & DESIGN” mark; the future expansion inquired after, then, is future expansion in those aspects of Applicant’s business that utilize that mark. Moreover even if Applicant were right to object that this document request inquires into

"Trademark Secrets" assertion of this unique objection would not excuse Applicant from providing information related to the scope of future expansion obviously intended by the document request, nor does the "Trademark Secrets" objection excuse Applicant from fulfilling its obligation to provide a privilege log sufficiently describing documents withheld on this basis.

Applicant's invocation of privilege is inconsistent with reliance on withheld documents to support Applicant's case. *See Presto Prods.*, 9 U.S.P.Q.2d at 1896 n.5 ("a party who has refused (even rightfully) to produce information sought in a discovery request may not thereafter rely on the information as evidence in its behalf"). Opposer is at a loss to understand how Applicant could have any colorable claim of "Trademark Secret" for the documents sought by the above-referenced requests. Moreover, if Applicant intends to rely on any document in Applicant's possession related to, *inter alia*, first use, marketing, or distribution of the name or mark at issue to support its position on any issue in this litigation, it cannot claim privilege for such documents. Of course all of this is unavoidably speculative, because Applicant has done nothing to comply with its obligation to provide information sufficient to permit Opposer to test its invocation of privilege. The shield of privilege cannot be transformed into a sword of advocacy by using privilege to protect the identity of documents from discovery until the Applicant is ready to spring the documents on an unsuspecting adversary. "Defendant[] cannot conceal such information from discovery and expect to spring it upon plaintiffs in the midst of trial for the sake of obtaining a tactical advantage in litigation." *Fox*, 120 F.R.D. at 530. Thus, at a minimum, Applicant must provide identifying information sufficient to permit Opposer to test any invocation of privilege by Applicant. *See Paulsen*, 168 F.R.D. at 289 ("Formally claiming a privilege should involve specifying which information and documents are privileged and for what reasons").

In its second set of responses, Applicant indicates its intent to produce responsive documents. Applicant should be compelled to produce responsive non-confidential documents forthwith; confidential documents upon entry of a suitable protective order; and a privilege log

describing withheld documents in detail sufficient to permit Opposer to test Applicant's invocation of privilege.

To address Applicant's confidentiality concerns, Opposer has submitted to Applicant a proposed Protective Order and forwarded the same with correspondence dated August 8, 2003, for Applicant's review and consideration. Phillips Decl., Exh. O. To date, Applicant has not responded to Opposer's proposal.

Applicant has also refused to produce "[r]epresentative samples of each of the goods with which Applicant has used or has intended to use the name or mark "STAACHI'S CO. 1996 & DESIGN" as requested by Opposer's Document Request Nos. 4, 7, 18, 24, 27 and 38. Applicant provides its products to consumers in the same manner that Opposer has asked Applicant to produce these samples. Thus there can be no justification for Applicant's refusal to ship samples to Opposer, for which Opposer is willing and prepared to pay, in just the same way.

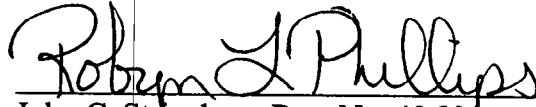
Applicant's sparse production to date, which constitutes six documents, two of which are identical, contradicts Applicant's own statements made in its letter of July 5, 2003, reproduced in Exhibit P hereto, in which Applicant states that it will "expeditiously" produce responsive documents as they are found. But Applicant's sense of expeditiousness is clearly not compliant with the standards established by the applicable rules; and Applicant's reprehensible discovery conduct to date suggests that the only terms of production acceptable to Applicant are terms which permit it to produce as little and as late as possible

Applicant should be compelled to produce the requested non-confidential documents and information before the deadline set by the TTAB, and as originally and reasonably requested by Opposer: by making and shipping copies, the expenses for which will be reimbursed by Opposer. Until Applicant complies with its obligations under the Rules of Federal Procedure, Opposer is unable to take deposition testimony in this matter or otherwise effectively prepare for and meet the pending deadlines currently set by the TTAB. Applicant should be compelled to produce the requested documents and information immediately and without delay.

V. **CONCLUSION**

For all of the foregoing reasons, Opposer's Motion to Compel Production of Documents should be granted in its entirety.

Respectfully submitted this 10th day of September, 2003.



John C. Stringham, Reg. No. 40,831

Robyn L. Phillips, Reg. No. 39,330

WORKMAN NYDEGGER

1000 Eagle Gate Tower

60 East South Temple

Salt Lake City, Utah 84111

Telephone: (801) 533-9800

Facsimile: (801) 328-1707

Attorneys for Opposer


SINCLAIR OIL CORPORATION

J:\15027203\008 Motion to Compel Doc Req.doc

CERTIFICATE OF SERVICE

I hereby certify that **OPPOSER'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND MEMORANDUM IN SUPPORT THEREOF** was served upon the Applicant, Sumatra Kendrick, by mailing a true and correct copy thereof by Express Mail, postage pre-paid, this 10th day of September, 2003, in an envelope addressed as follows:

Sumatra Kendrick
P.O. Box 434
Berkeley, CA 94701



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RICK D. NYDEGGER
BRENT P. LORIMER
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February 27, 2004

VIA HAND DELIVERY

Andrew P. Baxley
Interlocutory Attorney
Trademark Trial and Appeal Board
United States Patent and Trademark Office
2900 Crystal Drive
Arlington, VA 22202-3513

Re: *Sinclair Oil Corporation v. Sumatra Kendrick*
Opposition No. 152,940
For the Mark "STAACHI'S CO. 1996" with Design
Our File No. 15027.203

Dear Mr. Baxley:

As promised in our telephone conference of February 23, 2004, I am forwarding another copy of Opposer's Motion to Compel Production of Documents and Memorandum in Support Thereof and the Declaration of Robyn L. Phillips in Support of Opposer's Motion to Compel Production of Documents, which were filed on September 10, 2003, at the same time as Opposer's Motion to Compel Answers to Interrogatories and Memorandum in Support Thereof. A copy of the Certificate of Express Mail confirming that both motions to compel and supporting declarations were filed at the same time is also enclosed. As you know, a decision on the Motion to Compel Interrogatories has been made and an Order has issued.

As we also discussed in our telephone conference, Opposer requests that Opposer's Motion to Extend Discovery be granted from the date a decision on the Motion to Compel Production of Documents is issued. The current schedule in the above-referenced matter set in the Order of January 29, 2004, will again need to be reset. Please let me know if you need Opposer to resubmit the motion to extend, or if I can provide you any other documentation with regard to the Motion to Compel Production of Documents.

R. PARRISH FREEMAN, JR.
PETER F. MALEN, JR.
L. REX SEARS, PH.D.
ERIC M. KAMERATH
ROBERT E. AYCOCK
JENS C. JENKINS
KEVIN W. STINGER
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ANDREW S. HANSEN
CHAD E. NYDEGGER
JOSEPH G. PIA
CLINTON E. DUKE

Andrew P. Baxley
February 27, 2004
Page 2

Please feel free to contact me if you have any questions.

Sincerely,

WORKMAN NYDEGGER

A handwritten signature in black ink that reads "Robyn L. Phillips". The signature is written in a cursive style with a large, stylized "R" and "P".

ROBYN L. PHILLIPS

RLP:jlb

cc: Sumatra Kendrick (w/o enclosures)

Enclosures:

Opposer's Motion to Compel Production
of Documents and Memorandum in
Support Thereof

Declaration of Robyn L. Phillips in Support
of Opposer's Motion to Compel Production
of Documents

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of Trademark Application Serial No. 76/212,011
Published in the Official Gazette of May 28, 2002, at page TM 497, Int'l Class 35
Filed: February 20, 2001
Mark: STAACHI'S CO. 1996 & DESIGN

SINCLAIR OIL CORPORATION

Opposer,

v.

SUMATRA KENDRICK

Applicant.

Opposition No. 152,940

**CERTIFICATE OF EXPRESS
MAILING UNDER 37 C.F.R. § 1.10**

"Express Mail" Mailing Label No.: EK327849791US

I hereby certify that the following documents are being deposited with the United States Postal Service "Express Mail Post Office to Addressee" service under 37 C.F.R. § 1.10 in an envelope addressed to: Box: TTAB, Commissioner for Trademarks, 2900 Crystal Drive, Arlington, VA 22202-3513, on this 10th day of September, 2002:

- Transmittal (2 pgs.)
- Opposer's Motion to Compel Answers to Interrogatories and Memorandum in Support Thereof (16 pgs.)
- Declaration of Robyn L. Phillips in Support of Opposer's Motion to Compel Answers to Interrogatories with Exhibits (162 pgs.)
- Opposer's Motion to Compel Production of Documents and Memorandum in Support Thereof (24 pgs.)
- Declaration of Robyn L. Phillips in Support of Opposer's Motion to Compel Production of Documents with Exhibits (193 pgs.)
- Postcard



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TO THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD:
PLEASE STAMP AND RETURN. THANK YOU.

SUBMITTED: Transmittal Letter (2 pgs, in duplicate); Opposer's Motion to Compel Answers to Interrogatories and Memorandum in Support Thereof (4 pgs); Declaration of Robyn L. Phillips in Support of Opposer's Motion to Compel Answers to Interrogatories with Exhibits (162 pgs); Opposer's Motion to Compel Production of Documents and Memorandum in Support Thereof (24 pgs); Declaration of Robyn L. Phillips in Support of Opposer's Motion to Compel Production of Documents with Exhibits (193 pgs); postcard; Certificate of Express Documents with Exhibits (193 pgs); Mailing Label No. EK327849791US.

Opposer: Sinclair Oil Corporation
Applicant: Sumatra Kendrick
Opposition No.: 152,940
Mark: STAACH'S CO. 1996 & DESIGN
Serial No.: 76/212,011
Date of Mailing: September 10, 2003
Docket: 15027.203
Contact: Robyn L. Phillips
(801) 533-9800

Mailing Label